Lee Gee Pheng v RHB Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–389 OF 2002
NIK HASHIM, AUGUSTINE PAUL JJCA AND ZAINUN ALI J
21 OCTOBER 2003

Land Law — Charge — Order for sale — Land held under Land Office title — Unsuccessful auctions at land office — Application to High Court to substitute land administrator's order for sale — Whether application to be treated as fresh application for order for sale of land under Registry title — National Land Code s 265(3)

Land Law — Charge — Order for sale — Order for sale made by land administrator — No challenge made by chargor — Subsequent application by chargee to High Court to substitute order for sale — Whether validity of land administrator's order for sale may be challenged at the application for substitution

Land Law — Charge — Order for sale — Payments made by chargor after order for sale granted — Whether chargee prohibited from accepting payments from chargor after order for sale made — National Land Code s 266

The appellant charged a piece of land held under Land Office Title as security for a housing loan from the respondent. The appellant defaulted in repaying the loan and the respondent applied to the Land Office for an order for sale pursuant to s 260 of the National Land Code ('the Code'). After an enquiry the land administrator granted an order for sale ('the first order for sale'). The appellant did not challenge this first order for sale. Two unsuccessful auctions were conducted and consequently the land administrator issued a certificate of reference pursuant to s 265 (3) of the Code to the High Court. The respondent thereafter filed an originating summons in the High Court requesting a substitution of the first order for sale by the High Court. On 14 June 2001, the High Court granted the substituted order for sale ('the second order for sale'). The appellant at first appealed against this second order for sale but later withdrew the appeal and instead applied to set aside the second order for sale. The application was dismissed by the High Court and the appellant thus appealed to the Court of Appeal. The appellant submitted, inter alia, that the order for sale and originating summons were defective, null and void for non-compliance with the relevant provisions and requirements of the Code, the registered charge and the Rules of the High Court 1980. The appellant also submitted that the High Court judge erred in law and in fact when he decided he was functus officio when deciding upon the appellant's setting aside application. Further, the appellant alleged that the respondent had breached s 266 of the Code with the compromise and acceptance of payments after the land administrator's first order for sale.

Held, dismissing the appeal with costs:

(1) Section 265(3) of the Code cannot be construed as requiring the High Court to treat the originating summons as a fresh application for an order for sale of land held under registry title thereby requiring

compliance by the respondent with the provisions applicable thereto. Section 265 (3) of the Code merely conferred upon the High Court the power to substitute the first order for sale under s 256. The procedure for sale prescribed under s 265(3) is merely a continuation of the proceeding of transforming the order for sale by the Land Administrator into that of the High Court. There was thus no need for a fresh Form 16D to be issued in the instant case (see paras 9–11); *Arab Malaysia Finance Bhd v Shamsuddin bin Hj Ahmad & Anor* [1998] 5 MLJ 337 and *Bank Islam Malaysia Bhd v Shamsuddin bin Haji Ahmad* [1999] 450 MLJU 1 followed.

(2) Since all the requirements to obtain the first order for sale of the land held under Land Office title had been duly complied with and no challenge had ever been made against it, the appellant could not at the originating summons stage question the merits of the first order for sale granted by the land administrator. The appellant could have appealed to the High Court under s 418 of the Code which she initially did only to withdraw it later. The validity of the first order for sale could not therefore be challenged (see para 12).

(3) Once an order of court has been drawn up and perfected, as in the instant case, it cannot be altered, varied or set aside as the Court is functus officio. This is subject to certain established exceptions. On the facts the instant case did not fall within of the established exceptions (see para 14).

(4) Section 266 of the Code does not prohibit the acceptance by the respondent of payments from the appellant after the first order for sale. The section provides that an order for sale ceases to have effect only upon payment by the chargor to court of the full amount due and owing, including the amount due to the chargee at the time the order was made, any further amounts falling due thereafter and an amount sufficient to cover all expenses incurred in connection with the making or carrying into effect of the order. The payment made in the instant case did not comply with this requirement. Thus, there was no breach of s 266 of the Code by the appellant in this case (see 17).

(5) In the instant case, the second order for sale did not contravene any substantive statutory provisions. Neither was it defective in substance thereby justifying the Court of Appeal to intervene and have it set aside. The appellant ought to have proceeded with her appeal to the High Court and ought to have applied to the Court of Appeal to adduce additional evidence to support her complaints. This she did not do (see para 18).

[Bahasa Malaysia summary

Perayu telah mencagar sekeping tanah yang dipegang di bawah Hakmilik Pejabat Tanah sebagai jaminan satu pinjaman perumahan daripada responden. Perayu telah gagal untuk membayar pinjaman tersebut dan responden telah memohon kepada Pejabat Tanah untuk satu perintah

jualan menurut s 260 Kanun Tanah Negara ('Kanun tersebut'). Selepas satu siasatan, pentadbir tanah telah meberikan satu perintah jualan ('perintah jualan pertama'). Perayu tidak mencabar perintah jualan pertama ini. Dua lelongan yang tidak berjaya telah diadakan dan berikutan itu pentadbir tanah telah mengeluarkan satu sijil rujukan menuruts 265(3) Kanun tersebut kepada Mahkamah Tinggi. Responden kemudian telah memfailkan satu saman pemula di Mahkamah Tinggi memohon satu penggantian perintah jualan pertama oleh Mahkamah Tinggi. Pada 14 Jun 2001, Mahkamah Tinggi telah membenarkan penggantian perintah jualan ('perintah jualan kedua'). Perayu pada mulanya telah merayu terhadap perintah jualan kedua ini tetapi kemudian menarik balik rayuan dan sebaliknya memohon untuk mengenepikan perintah jualan kedua. Permohonan tersebut telah ditolak oleh Mahkamah Tinggi dan perayu dengan itu telah merayu ke Mahkamah Rayuan. Perayu telah berhujha, antara lain, bahawa perintah jualan dan saman pemula tersebut cacat, terbatal dan tidak sah kerana ketidapatuhan dengan peruntukan-peruntukan dan keperluan-keperluan yang relevan Kanun tersebut, gadaian berdaftar dan Kaedah-Kaedah Mahkamah Tinggi 1980. Perayu juga berhujah bahawa hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila beliau memutuskan beliau telah functus officio semasa membuat keputusan ke atas penepian permohonan perayu. Tambahan pula, perayu telah mengatakan bahawa responden telah melanggar s 266 Kanun tersebut dengan kompromi dan penerimaan bayaran-bayaran selepas perintah julan pertama pentadbir tanah.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 265(3) Kanun tersebut tidak boleh ditafsirkan sebagaimana menghendaki Mahkamah Tinggi supaya menganggap sama pemula tersebut sebagai satu permohonan baru untuk satu eprintah jualan tanah yang dipegang di bahawa hakmili daftar yang memerlukan pematuhan oleh responden terhadap peruntukan-peruntukan yang terpakai. Seksyen 265(3) Kanun tersebut hanya memberikan kuasa kepada Mahkamah Tinggi untuk mengganti perintah jualan pertama di bawah s 256. Prosedur untuk jualan yang ditetapkan di bawah s 265(3) hanya satu sambungan prosiding menjadikan perintah jualan oleh pentadbir tanah kepada satu di bawah Mahkamah Tinggi. Oleh itu tidak perlu ada Borang 16D yang baru dikeluarkan dalam kes semasa (lihat perenggan-perenggan 9–11); *Arab Malaysia Finance Bhd v Shamsuddin bin Hj Ahmad & Anor* [1998] 5 MLJ 337 dan *Bank Islam Malaysia Bhd v Shamsuddin bin Haji Ahmad* [1999] 450 MLJU 1 diikut.

(2) Memandangkan semua kepeluan untuk mendapat perintah jualan pertama tanah yang dipegang di bawah hakmilik Pejabat Tanah telahpun dipatuhi dan tiada cabaran dibuat terhadapnya, perayu tidak boleh di peringkat saman pemula menyoalkan merit perintah jualan pertama yang diberikan oleh pentadbir tanah. Perayu boleh merayu di bawah s 418 Kanun tersebut yang beliau telah lakukan pada mulanya tetapi telah menarik balik kemudian. Kesahihan perintah jualan pertama oleh itu tidak boleh dicabar (lihat perenggan 12).

(3) Setelah perintah mahkamah dibuat dan diperbaiki, seperti dalam kes semasa, ia tidak boleh diganti, diubah atau diketepikan kerana mahkamah adalah functus officio. Ini tertakluk kepada pengecualian yang tertentu sahaja. Berdasarkan fakta berikut, kes semasa tidak termasuk di bawah pengecualian-pengecualian tersebut (lihat perenggan 14).

(4) Seksyen 266 Kanun tersebut tidak menghalang penerimaan oleh responden berhubung bayaran daripada perayu selepas perintah jualan pertama. Seksyen tersebut memperuntukkan bahawa satu perintah jualan tidak lagi mempunyai kesan hanya selepas bayaran jumlah penuh yang perlu dibayar dan terhutang oleh penggadai kepada mahkamah, termasuklah jumlah yang perlu dibayar kepada pemegang gadaian pada masa perintah tersebut dibuat, apa-apa jumalh selanjutnya yang perlu dibayar selepas itu dan satu jumlah yang mencukupi untuk menampung segala perbelanjaan yang dikenakan berkiatan dengan pembuatan atau pelaksanaan perintah tersebut. Bayaran yang dibuat dalam kes semasa tidak mematuhi keperluan ini. Oleh itu tiada perlanggaran s 266 Kanun tersebut oleh perayu dalam kes ini (lihat perenggan 17).

(5) Dalam kes semasa, perintah jualan kedua tidak bercanggah dengan mana-mana peruntukan statutori yang substantif. Ia tidak cacat secara substantifnya dan oleh itu menjustifikasikan Mahkamah Rayuan untuk campur tangan dan mengenepikannya. Perayu sepatutnya meneruskan rayuan beliau ke Mahkamah Tinggi dan sepatutnya memohon ke Mahkamah Rayuan untuk mengemukakan keterangan tambahan untuk menyokong aduannya. Yang demikian beliau tidak lakukan (lihat perenggan 18).]

Notes

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2052–2157.

Cases referred to

Arab Malaysia Finance Bhd v Shamsuddin bin Hj Ahmad & Anor [1998] 5 MLJ 337 (folld)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (refd)

Bank Islam Malaysia Bhd v Shamsuddin bin Haji Ahmad [1999] 450 MLJU 1 (folld)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374 (refd)

Selvam Holdings (M) Sdn Bhd v Grand Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, interveners) [2000] 3 MLJ 201 (refd)

Legislation referred to

National Land Code ss 256, 260, 261, 262, 263, 264, 265(3)(b), 266, 418, Form 16D

Rules of the High Court 1980 O 20 r 11, O 28 r 4(1), O 32 r 6, O 35 r 2 O 83

TY The (TY Teh & Assoc) for the appellant.
Brendan Siva (Amin Mohd Salleh) (Kadir, Andri Aidham & Partners) for the respondent.

Nik Hashim JCA (delivering judgment of the court):

Facts

[1] The respondent bank granted the appellant a housing loan in the sum of RM80,000, secured by a charge dated 2 August 1983, and executed by the appellant in favour of the respondent over a piece of land held under a Land Office title, namely HS (M) 5933, Lot No 435, Mukim Petaling Wilayah Persekutuan ('the land').

[2] By reason of the appellant's default in servicing the said loan a Form 16D was issued by the respondent to the appellant on 6 November 1985. The appellant failed to comply with the same. Thereafter, the respondent applied to the Land Office for an order for sale under s 260 of the National Land Code ('the Code'). After carrying out an enquiry on 24 May 1989, the land administrator granted an order for sale on the same day ('the first order for sale'). No challenge was made by the appellant against the first order for sale.

[3] Thereafter two public auctions were conducted on 26 October 1989 and 27 July 1990 respectively. Both auctions were unsuccessful. Consequently on 1 March 1994, a certificate of reference under s 265(3)(b) of the Code was issued to the High Court by the land administrator.

[4] Hence, the respondent filed the originating summons dated 13 March 2000 in the High Court for substitution of the order for sale by the Land Office. On 14 June 2001, the High Court granted order in terms of the originating summons ('the second order for sale'). The appellant appealed against the second order for sale but later withdrew the appeal.

[5] Subsequently, an application to set aside the second order for sale of the High Court was filed by the appellant on 11 October 2001 ('the application'). The application was dismissed by the learned High Court judge on 10 May 2002.

[6] The appeal before this court is against the decision of the learned High Court judge in dismissing the application.

Appeal

[7] Essentially, the appellant's complaints are that the order and the originating summons are defective, null and void for non-compliance with the relevant provisions and requirements of the Code, the charge instrument registered on 2 August 1983, O 83 of the Rules of the High Court 1980 ('the RHC') and the law.

[8] It is to be noted that the land is held under a Land Office title. The provisions applicable to the sale of such land are set out in ss 260 to 265 of the Code. These provisions have been complied with in this case and accordingly the first order for sale was made by the land administrator on 24 May 1989. Subsequently, two public auctions were held but both were unsuccessful.

Section 265(3)

[9] Section 265(3) of the Code provides that in the event of two unsuccessful auctions the land shall be withdrawn from sale and the land administrator shall refer the matter to the High Court which court may substitute the order of the land administrator with an order for sale under s 256 of the Code. By its terms, it is clear that s 265(3) cannot be construed as requiring the High Court to treat the originating summons as a fresh application for an order for sale of land held under registry title requiring compliance by the respondent with the provisions applicable thereto. Section 265(3) merely confers on the High Court the power to substitute the firstfirst order for sale under s 256. In this regard, we were referred to the case of *Arab Malaysia Finance Bhd v Shamsuddin bin Hj Ahmad & Anor* [1998] 5 MLJ 337 where at p 344 Mohd Hishamudin J said:

> It, therefore, follows that the reference to s. 256, in sub-s 3(c) of s 265, cannot be construed as the imposition of a duty or the conferment of a right on the chargee to make a fresh application for sale under s 256; neither can the charger be permitted to treat the reference as such ...

[10] That case was followed by Alauddin J (as he then was) in *Bank Islam Malaysia Bhd v Shamsuddin bin Haji Ahmad* [1999] 450 MLJU 1 where his Lordship said:

> Sungguhpun s 256 di sebut didalam subklausa (c) (s 265(3)) ini tidak bermakna bahawa ianya boleh dianggap bahawa permohonan plaintif di buat dibawah seksyen tersebut.

[11] We agree with the aforesaid views. The procedure for sale prescribed under s 265(3) is merely a continuation of the proceeding of transforming the order for sale by the land administrator into that of the High Court. Thus, there is no need for a fresh Form 16D to be issued in this case.

[12] Since all the requirements to obtain the first order for sale of the land held under Land Office title had been duly complied with and no challenge had ever been made against it, the appellant could not at the originating summons stage question the merits of the 1 order for sale granted by the land administrator. The appellant could have appealed to the High Court under s 418 of the Code which she initially did only to withdraw it later. It follows therefore that the validity of the first order for sale cannot now be challenged.

Functus officio

[13] The appellant also complained that the learned judge erred in law and in fact in ruling that he was functus officio when deciding on the application.

[14] It is worthy of note that once an order of court has been drawn up and perfected, as in this case, it cannot be altered, varied or set aside as the court is functus officio. The proper recourse for a party dissatisfied with the order is to appeal against it. However, this general principle is subject to certain established exceptions which allow the court to set aside or amend a final order. A final order may be set aside or amended without the need to appeal in the following cases:

(i) to correct errors in expressions of the intention of the court (the slip rule) pursuant to O 20 r 11 of the RHC;

(ii) where the order is made in the absence of a party at the hearing: O 28 r 4(1); O 32 r 6; O 35 r 2 of the RHC;

(iii) where the order has been obtained in breach of natural justice: *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374;

(iv) where the order contravenes a substantive statutory provision rendering it defective on grounds of illegality or lack of jurisdiction; and

(v) where the justice of the case requires the court to correct a serious defect in the order: *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; *Selvam Holdings (M) Sdn Bhd v Grand Kenyon & Eckhardt Sdn Bhd; (BSN Commercial Bank (M) Bhd & Ors, interveners)* [2000] 3 MLJ 201.

[15] The present case does not fall within any of the abovementioned established exceptions. Both the appellant and her counsel knew of the hearing date and the appellant was present in court but chose not to say anything against the respondent's application for the second order for sale. The learned judge was therefore correct in dismissing the appellant's application.

Section 266

[16] Further, the appellant alleged that the respondent had breached s 266 of the Code with the compromise and acceptance of payments after the land administrator's first order for sale. However, learned counsel for the respondent contended that there is no evidence of any compromise between the appellant and the respondent. The appellant had however made certain payments toward the amount due and owing by the appellant to the respondent. These had been taken into account to reduce the amount outstanding.

[17] Section 266 of the Code does not prohibit the acceptance by the respondent of payments from the appellant after the first order for sale. The

section provides that an order for sale ceases to have effect only upon payment by the chargor to court of the full amount due and owing, including the amount due to the chargee at the time the order was made, any further amounts falling due thereafter and an amount sufficient to cover all expenses incurred in connection with the making or carrying into effect of the order. The payment made does not comply with this requirement. It is therefore clear that there has been no breach of s 266 of the Code by the appellant in this case.

[18] These are some of the matters raised before us but were never raised by the appellant in the High Court when the second order for sale was made on 14 June 2001. We found that the second order for sale did not contravene any substantive statutory provisions and neither was it defective in substance thereby justifying this court to intervene and have it set aside. In our view, the appellant ought to have proceeded with her appeal to the High Court and ought to have applied to this court to adduce additional evidence to support her complaints. This she did not do.

Conclusion

[19] Accordingly, we dismissed the appeal with costs and ordered the deposit be paid out to the respondent to account of its taxed costs.

Appeal dismiised with costs.

Reported by Andrew Christopher Simon